IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2502 OF 2004

Barik Kisan Giri ..Petitioner.

Vs.

Ramesh D. Mishra & Ors. ..Respondents.

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Mr. Mihir Desai with Ms. Sushma Debasaman for the Petitioner.
Mr. Sunil Dighe for Respondent No.1.
Mr. A.G. Kothari for Respondent Nos.2 and 3.
Mr. M.D. Naik, AGP for Respondent Nos.4 and 5.

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CORAM : DR.D.Y.CHANDRACHUD, J.

8th February, 2005.

P.C. :

The Petitioner is an M.A. and has also completed his post-graduation in Physical Education. The Petitioner has moved this Court, stating that he is fully qualified to hold the post of lecturer in Physical Education in a Junior College. The Petitioner belongs to the Nomadic Tribes. On 9th May, 1997 an advertisement was issued by the Vaze College of Arts, Commerce and Science by which the post of a Physical Education Teacher came to be advertised as a reserved post.

The Petitioner applied for the post and was interviewed, selected and appointed from 30th June, 1997. The Petitioner was appointed on probation and the letter of appointment is annexed at Exh.C to the Petition. On the date when the Petitioner was appointed, he was not informed that a teacher belonging to the open category was earlier occupying the post and upon his termination, an appeal has been filed before the School Tribunal. The Education Department had granted its approval to the appointment of the Petitioner. It appears that the First Respondent was appointed in a temporary capacity on 11th June, 1993 for the academic year 1993-94. The appointment of the First Respondent was extended from time to time again on a temporary basis for the academic years 1994-95 and 1995-96. The services of the First Respondent were terminated by an order dated 18th March, 1996 on the ground that the appointment was against a reserved vacancy subject to a reservation backlog. The First Respondent moved the School Tribunal which allowed the appeal by order dated 27th August, 2004. The School Tribunal held that the post which was advertised was a clear vacant and open post and that the reservation roster that

was produced before it also showed that the post belonged to the open category. The Tribunal held that the First Respondent was appointed in a clear open and permanent vacancy and that under Section 5(2) of the Act, the appointment of the First Respondent must be regarded as having been confirmed upon satisfactory completion of the probationary period of two years. This Petition has been instituted by the Petitioner who was appointed by the college upon the vacancy that was created upon the termination of the services of the First Respondent.

At the hearing of the Petition, counsel appearing on behalf of the First Respondent stated before the Court that the First Respondent would have no objection if he is declared as surplus under the provisions of Rule 26 of the Maharashtra Employees of Private Schools Rules, 1981. Counsel appearing on behalf of the First Respondent stated that this would be without any financial liability on the part of the Education Department. However, it was submitted that the declaration of the First Respondent as surplus would enable him to seek absorption in any other institution where there may

be a vacancy. This request is neither opposed by counsel for the Petitioner nor for the management. The order of the School Tribunal has not been challenged by the Education Department and in so far as the findings are concerned, the First Respondent has been declared to be an employee who was confirmed upon being appointed against a clear and permanent vacancy during the years 1993 and 1996. Unless the department chooses to challenge the findings of the School Tribunal, there is no reason why the First Respondent should not be given the benefit of the provisions of Rule 26 to the extent of declaring him surplus. In the circumstances, this Petition is disposed of with a direction that the Fourth Respondent shall take steps to process the case of the First Respondent under Rule 26(2)(iii) of the Maharashtra Employees of Private Schools Rules 1981. In that view of the matter, the order of the School Tribunal dated 27th August, 2004 granting reinstatement and backwages to the First Respondent shall stand quashed and set aside with the consent of the parties. The Fourth Respondent shall now take necessary steps in compliance of this order within a period of eight weeks from today.

The Writ Petition is allowed in the aforesaid terms. There shall be no order as to costs.